No. 20196

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellant,*

vs.

CITY OF SEATTLE, *Appellee.*

CITY OF SEATTLE, *Appellant,*

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellee.*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

BRIEF OF APPELLANT-APPELLEE
Public Utility District No. 1 of Pend Oreille County

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THE FRANKLIN PRESS, SPOKANE

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EXPLANATORY NOTE

The transcript of record on this appeal, which will be referred to herein by the designation "R," consists of the following:

(1) Original papers from the file of the Clerk of the District Court bound together;

(2) The Court Reporter's transcript of the proceedings at the time of the hearing on the pretrial order. This is under separate cover and, in addition to the designation "R," will also include the further designation "HPO" (hearing on pretrial order);

(3) The Court reporter's transcript of the proceedings at the time the findings of fact and conclusions of law were presented to the District Court. This is under separate cover and, in addition to the designation "R," will also include the further designation "PCF" (proceedings concerning findings);

(4) The Court reporter's transcript of the proceedings at the time of the District Court's ruling on motion to reconsider. This is under separate cover and, in addition to the designation "R," will also include the further designation "MTR" (motion to reconsider).

The reporter's transcript of the evidence and proceedings, consisting of 12 volumes, will be referred to by the designation "R. Tr."

Exhibits will be referred to by the designation "Ex." Seattle's exhibits will be prefixed with the letter "P" (Ex. P. .....), and the PUD's exhibits will be prefixed with the letter "D" (Ex. D. .....).

JURISDICTIONAL STATEMENT

This is an appeal from the judgment and decree of condemnation filed March 10, 1965, determining the compensation payable by Appellee-Appellant, City of Seattle (hereinafter referred to as Seattle), for the condemnation of properties and rights owned and held by Appellant-Appellee, Public Utility District No. 1 of Pend Oreille County (hereinafter referred to as PUD) (R. 96-99). Notice of appeal and notice of cross-appeal were both filed April 9, 1965 (R. 106, 109).

The jurisdiction of the district court was invoked under Section 21 of the Federal Power Act (Title 16 U.S.C., Sec. 814) (R. 1). The jurisdiction of this court is invoked under Title 23 U.S.C., Sec. 1291.

STATEMENT OF THE CASE

The PUD is a municipal corporation organized and existing pursuant to the laws of the State of Washington. Its boundaries are co-extensive with the boundaries of Pend Oreille County, Washington, and it owns, operates, and maintains electric utility properties for the generation and transmission of electric power and energy for sale within and without the District. The PUD's lifeline is the Pend Oreille River, a navigable stream flowing in a generally northerly direction from the State of Washington into British Columbia, Canada. The entire course of this river in Washington is within the boundaries of the PUD. Commencing in 1952, and pursuant to a license issued by the Federal

Power Commission, the PUD constructed what is known as its Box Canyon Dam project on said river about 19 miles south of and upstream from the Canadian border (R. 26, 27, 33).

Seattle is a municipal corporation in the State of Washington and through its Department of Lighting operates and maintains a lighting and power system. (R. 26).

In addition to the properties and rights used directly in the operation of its Box Canyon Dam project, PUD, except for a few scattered small tracts of privately owned land, owned and held all of the uplands, shore lands, and rights to perpetually back and hold the waters of said river upon state-owned shore lands situated downstream from the Box Canyon Dam which were sufficient, together with available federal lands set aside for power site purposes, to permit the construction and operation of the Boundary Dam hydroelectric project now being constructed by Seattle on said river or the Z Canyon dam hydroelectric project planned by the PUD in the same general area (Exs. D. 109, D. 133, P. 12; R. 84-89, 93). The Boundary dam site is located approximately one mile upstream from the Canadian border (Ex. D. 109; R. 82). The Z Canyon dam site is located about one mile upstream from the Boundary site (Ex. D. 109; R. 82). Both sites are adaptable to the production of hydroelectric power and utilization of one site precludes the use of the other (R. 88).

This action concerns the condemnation by Seattle of these lands and rights owned by PUD downstream from Box Canyon dam. These lands and rights are shown on the map Ex. D 109 and the photographs (Exs. D. 113-114), which are inserted herein and are generally described as follows:

(a) 191.47 acres, more or less, of uplands located on west side of the Pend Oreille River at the Z Canyon dam site (Colored blue on the map).

(b) Fee simple title to all shore lands on both sides of the Pend Oreille River from a point commencing a short distance downstream from the Boundary dam site and running thence upstream to a point approximately 2 miles upstream from the Z Canyon dam site (Colored red on the map).

(c) The right, privilege, and authority to perpetually back the water of the Pend Oreille River upon, and overflow and inundate with said water the state-owned shore lands in the erection, construction, maintenance and operation of a water power plant. The shore lands affected by the aforementioned perpetual rights are the shore lands located on both sides of the Pend Oreille River from the Z Canyon dam site running upstream approximately 17 miles to the PUD's Box Canyon dam (Colored green on the map. It will be noted that, commencing at the Z Canyon dam site and running for a short distance upstream, the rights described in paragraph (c) overlap the shore

lands owned in fee simple. This area is colored red and green alternately.)

(d) An easement and right of way for the purpose of maintaining a measuring cable, stay cable, gaging station and other devices necessary or useful in stream-gaging work on uplands adjoining the river (Colored brown on the map). Map and pictures follow this page.

PUD's predecessor in ownership of the lands and rights in question was Hugh L. Cooper, now deceased, a well-known hydroelectric engineer. (R. 27-29, 91; R. Tr. 434-38).

By 1916, several years prior to the passage of the Federal Power Act in 1920, Mr. Cooper had united the various parcels of lands and rights which Seattle seeks to condemn in this action (R. 27) and had tested the foundation of the Z Canyon site and established its suitability to support a dam by sinking a 200 foot shaft along side the right bank of the river, tunneling under the river, and test drilling in all directions from the tunnel (R. Tr. 435, Ex. D. 112).

In 1928, Cooper installed on the properties at a point downstream from the Z Canyon site a measuring and gaging station for the purpose of measuring and recording the stream flow (R. 34).

In 1928, Cooper secured a preliminary permit from the Federal Power Commission and submitted his plans for the construction of a hydroelectric project at the Z Canyon site. His application for license was

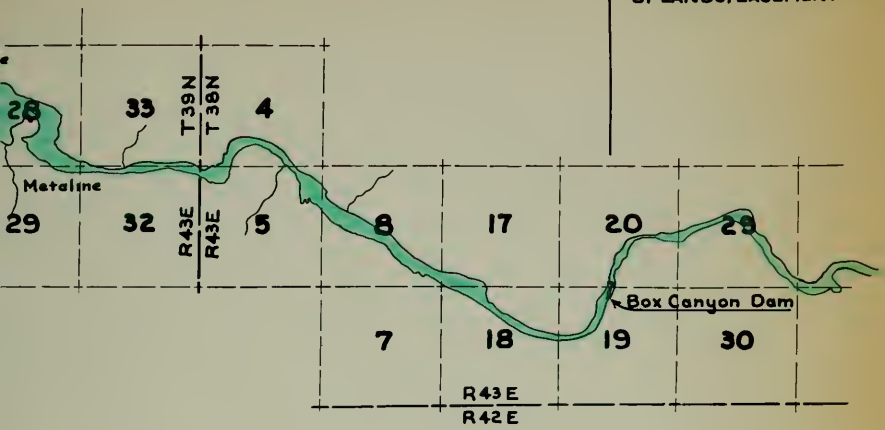

Public Utility District Property - All Pend Oreille River Shorelands Fr
2
11
Proposed Z-Canyon Dam
14
23
26
35
T40N
T39N
2
11
Proposed Boundary Dam
P.U.D.
3
10
15
22
27
34
R43E
R43E
3
10
CANADA
UNITED STATES
Enlarged Portion
SEC. 2
SEC. 3
SEC. 11
6
1
Proposed Boundary Dam
1
2
Z-Can
Gagin
PEND
Gage House
Intake
Measuring Cable
Stall Cable
PUD
ORE
8
Formerly Lot 3
7
2
4
SEC. 10
9

Z-CANYON LA

To Box Canyon Dam, Sec. 19 T38N R43E W.M.

PUBLIC UTILITY DISTRICT No.1
OF PEND OREILLE COUNTY
WASHINGTON

PROPERTY
SHORE LANDS, FEE TITLE
SHORE LANDS, PERPETUAL OVERFLOW
UPLANDS, FEE TITLE
UPLANDS, EASEMENT



& LAND RIGHTS

Drawn By: D. Tucker - Sept. 22, 1961

EXHIBIT NO. 113

Looking upstream from left bank at a point hundreds of feet above the river.

EXHIBIT NO. 114

Looking downstream from the right bank of the river at a point a few feet above the bottom of the canyon.

denied without prejudice in 1936 (R. 34). Both the Boundary project and the Z Canyon project would occupy lands of the United States government (R. 30, 89) which have been set aside as power site reserves by executive orders (Exs. D. 110, 111; R. 93).

In addition to the properties and rights above described, the Cooper estate also owned and held the perpetual right to back the river water upon and overflow the shore lands lying upstream from the Box Canyon dam site. It was necessary that PUD acquire said rights in order to build and operate the Box Canyon project (Ex. D. 136). By negotiations culminating March of 1953, PUD acquired all of Cooper's property and rights both upstream and downstream from the site of the Box Canyon dam as a package deal (R. Tr. 951; Exs. D. 116, 117). This package also included Cooper's plans, engineering data, details and the results of development work for a dam at Z Canyon, which said plans, data and details were revised for PUD by Harza Engineering Company. Said plans aforesaid were acquired and revised as a part of the plan of the PUD for the development of a dam and power house at the Z Canyon site and in support of its application to the Federal Power Commission for a license (R. 91).

Negotiations that were initiated by Seattle a few months after PUD acquired the properties and rights with which we are here concerned, should be noted.

Seattle's Proposal for Joint Development

E. R. Hoffman, then Superintendent of Seattle City Light, wrote a letter to the manager of the PUD, dated October 28, 1953, (Ex. D. 119) stating that Seattle was filing with the Federal Power Commission an application for preliminary permit for the Boundary project on the Pend Oreille River. The letter suggests a cooperative agreement with PUD. On October 30, 1953, Mr. Hoffman wrote to the Seattle City Council with reference to such filing for a project some 350 miles northeast of Seattle and disclosed the receipt of notice from PUD, on October 29, 1953, of its intention to develop a project on this stretch of the river (Ex. D. 120). The record establishes that at that time PUD owned and held all of the properties and rights above described, and that Seattle owned or held absolutely nothing in this area. In February, 1954, Paul Raver, the new Superintendent of Seattle Light, and other Seattle representatives met with representatives of the PUD (R. Tr. 337) and thereafter subsequent meetings were held to further the joint venture for development of the Z Canyon-Boundary reach of the river (R. Tr. 345-46).

Memorandum of Intent

At the meeting of August 24, 1954, Mr. Campbell, PUD manager, explained that, because of the failure of the parties to reach an agreement on a fifty-fifty basis, the PUD commissioners had passed Resolution No. 328 (Ex. D. 122) directing him to file an applica-

tion for a license for a power project at Z Canyon. He said some action must be taken or he would file the application. Dr. Paul Raver, Superintendent of City Light, then called a stenographer and dictated what was termed a Memorandum of Intent (R. Tr. 466-67, Ex. D. 123). (Appendix pgs. 1-3)

It will be seen from this exhibit that PUD's ownership of lands and rights in the Z Canyon area and its definite plans for the development of a dam and power house at that stretch of the Pend Oreille River were recognized. Also, it shows that Seattle and PUD were commited to development of a power project at this location on a fifty-fifty basis.

Activities in this respect went so far as to include the submission of legislation which was enacted by the Washington State legislature in 1957 authorizing joint development of a power project by public bodies such as Seattle and PUD (R. Tr. 948-49). After the Memorandum of Intent was written, PUD did not file its application for a preliminary permit as had been directed in Resolution 328 (Ex. D. 122).

On July 29, 1957, disregarding the Memorandum of Intent, Seattle filed an application with the Federal Power Commission for a license for the construction and operation of the Boundary project in its name alone without joining PUD therein. Upon learning of this filing, PUD, on August 27, 1957, filed with the Federal Power Commission a petition to intervene in Seattle's application proceedings, together with an

alternate plan for a dam and power plant at the Z Canyon site. Shortly thereafter, a number of mining companies having properties in the area also intervened for the purpose of resisting all applications. On September 5, 1959, PUD filed a revised application for a license to construct and operate a hydroelectric project at the Z Canyon site. The various applications and petitions to intervene were consolidated for hearing.

The prayer of the mining companies was denied, as was PUD's application for a license, and Seattle's application for a license was granted (Ex. P. 9).

On March 8, 1963, Seattle filed its complaint in this action.

The Pretrial Order and Hearing

On March 2, 1964, the pretrial order in this action was entered (R. 26-47). On that day a hearing was held by the District Court for the purpose of clarification of issues.

One of the principal purposes of the pretrial order and the hearing held thereon was to determine what elements entering into the valuation of the PUD properties should be considered. The PUD contended the highest and best use of said properties and rights was for power site purposes and that this element of value was to be considered (R. 44). It was an admitted fact in the pretrial order that both "the Boundary and Z Canyon sites are physically adaptable to development for the production of hydroelectric power." (R. 29-30). During the trial, the District Court expressed the

belief that in fact the pretrial order conceded that the highest and best use of said properties was for power site purposes (R. Tr. 630-631). Seattle did argue, however, that this element of value should not be considered for two principal reasons.

The first was that, as the holder of a license from the Federal Power Commission, Seattle had inherited the federal government's right of dominant servitude over the flow of this navigable stream.

The second was that neither the PUD nor a purchaser from it could acquire the remaining lands necessary for a hydroelectric project at this location without resorting to eminent domain and this would preclude consideration of power site value (R. 41, 42; R. HPO 106-121).

The District Court rejected Seattle's contention that it succeeded to the government's sovereign right of dominant servitude over the stream. The District Court ruled that PUD had the right to establish (1) that the highest and best use of this property was for power site purposes; and (2) that there was a reasonable possibility in the reasonably near future that the PUD or its purchaser could develop this property as a power site (R. HPO 129-30) and with reference to PUD's properties and rights, said,

> "they are entitled to have them evaluated as in the *Powelson* case, and in the *Grand River Dam Authority* case, for *power site purposes.*" (R. HPO 132. (Emphasis added.)

On the matter of just compensation, PUD also contended that consideration should be given to severance damage it would suffer by the taking of its properties and rights downstream from its Box Canyon project which were used by and which would be useful in the operation of its Box Canyon plant and with its contemplated hydroelectric project at the Z Canyon site (R. 45). Seattle argued that such severance damages could not be considered.

On the question of severance damage, the District Court ruled that, the PUD not yet having completed a dam at Z Canyon which was in actual operation in coordination with its Box Canyon Plant, the rules of severance damage did not apply and that "there should not be submitted to the jury any question of severance damages." (R. HPO 133).

This was the posture of the case at the commencement of trial to the District Court without a jury. It was in this setting that the following colloquy took place:

> "THE COURT: All right, the Clerk will then file the stipulation.
>
> "I think perhaps we should determine now where the burden of proof will be and who will have the burden of going forward, and I think it is somewhat covered by our previous discussions. I assume that the PUD may wish to do that; is that correct?
>
> "MR. ENNIS: We had discussed this with counsel. It was our thought that, Seattle being the plaintiff, would go ahead with their evidence of

taking and of the value, then the PUD will put in its evidence of value, our valuation, and Seattle can rebut that.

"MR. WHITE: That is satisfactory, your Honor.

"THE COURT: Ordinarily in a condemnation case, that is the order of proof, but where is the burden of proof?

"I don't think it is particularly important in a condemnation action of this kind where we have settled the primary legal problems.

"MR. ENNIS: Particularly in the absence of a jury. I suppose if we were making a trade with Seattle opening and closing, we would trade them that for the order of the Court that there would be no burden of proof instruction given to the jury, but where the Court is sitting alone here, I think that it probably becomes academic, in a sense. The Court will determine who has the burden and whether they have met it, I assume."

"THE COURT: All right . . . (R. Tr. 14, 15).

The Trial

Seattle proceeded to put in its case. Its expert valuation witnesses valued the properties in the light of their useability for timber reforestation and without consideration to their use as a unit (R. Tr. 90, 147, 191, 223). Neither of Seattle's valuation witnesses gave any consideration to the value of the properties for power site purposes (R. Tr. 149-52, 222). The District Court specifically found in Finding of Fact No. XXI. (R. 94) that the valuation expressed by Seattle's witnesses included no power site value. Neither of said wit-

nesses professed to engineering knowledge or experience in determining values of property constituting all or practically all of the property necessary for a hydroelectric project. In fact, one of said witnesses, Mr. McQuigg, admitted he had no experience at all in appraising power sites (R. Tr. 218, 222) and that he was not competent to appraise property for power site purposes and would not attempt to do so.

In its case PUD established that the highest and best use of its properties and rights was for hydroelectric power purposes, and the District Court specifically so found in Finding of Fact XIX. (R. 93).

PUD established that it acquired the properties and rights as a part of its program to develop a dam and power house at the Z Canyon site, and the District Court specifically so found in Finding of Fact XVI. (R. 91).

PUD established that its high Z Canyon project, as proposed by it to the Federal Power Commission, with a pool elevation of 1985 feet, would require 2198 acres. Of this acreage, only 47 acres would have to be acquired from private owners. If it be assumed that the Federal Power Commission would have required a 200 foot buffer zone as part of the project, as it did for Seattle's Boundary project, the privately owned acreage that PUD would have had to acquire would be increased to only 143.2 acres out of a total of 2547.2 acres (see Finding of Fact XII., R. 88, 89). PUD's proposed low Z Canyon project, with a pool elevation

of 1885 feet, would, of course, require the acquisition of still fewer acres of private land.

PUD established that it or any prospective developer could acquire whatever additional lands were needed for the low Z Canyon project by voluntary transfer without resorting to condemnation (Finding of Fact XI., R. 88). The District Court entered a Conclusion of Law that PUD had sustained the burden of showing by a preponderance of the evidence that it was reasonably probable that PUD or a purchaser from it "could have assembled or could assemble in the reasonably near future by voluntary transfer the remaining non-federal parcels and property rights necessary to construct and operate a hydroelectric project at the Z Canyon site to pool elevation 1885 feet." (Conclusion of Law III., R 94, 95).

PUD's Basic Witnesses

For purposes of establishing the background and a basis for its expert valuation witnesses, the PUD called as witnesses the following:

Mr. Arthur E. Allen, a civil engineer employed by Harza Engineering Company as head of its engineering and planning department. Mr. Allen possesses both a B.S. degree and a M.S. degree in civil engineering from the Carnegie Institute of Technology (R. Tr. 484).

Mr. Mark D. Stenson, principal engineer with R. W. Beck & Associates, consulting engineers. Mr. Stenson, the holder of a degree in electrical engineering and registered in the States of Washington, Oregon, New Mexico and Texas as a professional engineer, had extensive experience in the construction and financing field of hydroelectric development (R. Tr. 739-46).

Mr. Donald J. Bleifuss, a consulting civil engineer who had completed countless investigations and reports in his participation in the construction and development of numerous hydroelectric projects throughout the world. (R. Tr. 822-29).

The Witness Allen

Mr. Allen testified to the type of hydroelectric project to which the PUD's Z Canyon site was adapted. He demonstrated a project could be constructed at the Z Canyon site with a 555 megawatt installed generating capability at a total cost of $62,100,000, exclusive of financing costs and land and land rights costs (R. Tr. 649). This project would have a reservoir elevation of 1990 feet, the same as that of Seattle's Boundary project which is presently under construction (R. Tr. 652). Ex. D. 130A was admitted into evidence as illustrative of the testimony of the witness (R. Tr. 669).

Mr. Allen stated that, in his opinion, the project which he described as a typical project to which the PUD's Z Canyon site was adapted was one of very low cost and that the site was, in his opinion, of very

high value. In his experience he had known of people who were eager to build and did build hydroelectric projects costing approximately twice as much per kilowatt as the proposed Z Canyon project which he described (R. Tr. 687).

This witness also described a typical hydroelectric project that could be constructed at the Z Canyon site with a reservoir elevation of 1885 feet. Such a project would have a generating capability of 345 megawatts (R. Tr. 706); and its construction costs, exclusive of land rights and financing charges or transmission costs, would be $56,420,000. (R. Tr. 710). Exhibit D 130B was admitted into evidence as illustrative of the testimony of the witness regarding the proposed "Low Z" project (R. Tr. 709). The witness testified on cross-examination that cost estimates on proposed projects of this nature were quite accurate and that in his experience on projects which he had seen through from planning to completion, the fartherest he had been off in construction costs was 5 percent (R. Tr. 688).

The PUD attempted, through the witness, Allen, to show the adaptability for a hydroelectric project of the Boundary site where Seattle is presently constructing its project.

The PUD explained its theory to the Court in this respect that a prospective purchaser of the PUD's properties could and would consider the advisability of constructing his project at the Boundary site as an

alternative to constructing it at the Z Canyon site (R. Tr. 577-78). Under this theory, the witness Allen proceeded to testify regarding the description, construction costs, and generating capability of a hydroelectric project at the Boundary site (R. Tr. 574-712).

PUD's exhibit for identification (D-I-130), constituting the written report prepared by the witness Allen in conjunction with his testimony concerning the Boundary site, was objected to by Seattle (R. Tr. 627-28). This objection was sustained (R. Tr. 629).

The striking of Mr. Allen's testimony pertaining to the Boundary site (R. Tr. 718), the rejection of PUD's exhibit for identification, D-I-130, and the rejection of PUD's offer of proof in this regard (R. Tr. 721), are the subject matter of specifications of error No. 1 and will be further discussed in that part of the brief.

The Witness Stenson

Mr. Mark D. Stenson, referred to above, testified that the average annual energy capability of the proposed high Z Canyon project would be 3,476,000,000 kilowatt hours, and that of the proposed low Z Canyon project would be approximately 2,000,000,000 kilowatt hours (R. Tr. 750). This energy capability might in the future be increased by a large upstream project which had at that date been proposed but not yet completed (R. Tr. 751).

To the initial construction costs of the proposed "high Z" or "low Z" projects at the PUD's Z Canyon

site as testified to by the witness Allen, the witness Stenson added interest costs, certain fund costs (R. Tr. 753), and financing costs (R. Tr. 778), and concluded that the total bond issue costs, exclusive of land and land rights costs, for the proposed high Z Canyon project would be $77,600,000 and that such cost for the proposed low Z Canyon project would be $69,250,000 (R. Tr. 778). He thus concluded that the average cost of energy per kilowatt hour, computed without considering cost of site, at the proposed high Z Canyon project over the assumed fifty-year bond life would be 1.587 mills per kilowatt hour, and that such average cost of energy at the proposed low Z Canyon project would be 2.385 mills per kilowatt hour (R. Tr. 779).

In referring to Mr. Stenson, the Court said:

> "You have already qualified him as an expert. You can ask him whether it is possible, can't you?" (R. Tr. 781).

When questioned as to whether or not PUD could, in the reasonably near future, devote its properties to the proposed use at Z Canyon, Mr. Stenson testified:

> "Well, I don't think there is any question but what it could be developed by the District." (R. Tr. 786).

The witness Stenson later testified that through his experience with similar projects he assumed that the PUD would have no difficulty in marketing the power that would be produced at the Z Canyon project (R. Tr. 820-21).

The Witness Bleifuss

Mr. Donald J. Bleifuss, who had examined and evaluated the Z Canyon site (R. Tr. 829-30) and who had in his experience made literally hundreds of cost estimates on projects similar to those testified to by the previous witness, Allen, had spot checked the calculations of the witness Allen and found them to be reasonable, in his opinion (R. Tr. 831-34).

The witness Bleifuss testified that there are three aspects to be considered in determining the desirability of a particular site for a hydroelectric project: Physical feasibility, functional feasibility, and economic feasibility (R. Tr. 833). From his study of the Z Canyon site, he found its physical feasibility to be almost ideal, being well suited to the development of a hydroelectric project (R. Tr. 835). Likewise, he found the functional feasibility to be very good from the fact that the terrain and the river profile permit concentration of head at the site and the fact that the site is on a stream which possesses a sufficient amount of flow to develop energy at the site (R. Tr. 835-36). He testified that economic feasibility of a hydroelectric site is determined by one thing only, and that is the average unit cost of energy which is obtained by dividing the annual cost of operating a plant constructed at the site by the average annual energy production (R. Tr. 836). In the words of the witness, this element of economic feasibility is of the utmost importance to a prospective developer of the site "because any reasonable man would form his judgment on the basis of what the

production is worth to him, and in order to estimate that he has to know those costs." The witness projected cost estimates for a proposed hydroelectric project at the Z Canyon dam as he had done for many other clients in the past (R. Tr. 841, 846, 848), and concluded that energy could be produced through the construction of a high dam at 1.5273 mills per kilowatt hour and through the construction of a low dam at 2.3356 mills per kilowatt hour (R. Tr. 850). Because the cost of land and land rights was the matter at issue in the trial, the above figures, of course, excluded that element of cost.

VALUATION WITNESSES

John L. Vaughan, Jr.

The PUD's first value witness, John L. Vaughan, Jr., was vice president in charge of special appraisals with the evaluation and appraisal firm of Marshall & Stevens, Inc. He had been in charge of special appraisals with that firm since 1948. He had completed two years at the University of Virginia, had studied electrical engineering at the Brooklyn-Edison Company's Employees' Institute, and had completed courses in the economics of property evaluation at the University of Southern California (R. Tr. 1059-61). The witness was a registered professional engineer in the State of California, a member of the National Society of Professional Engineers, the California Society of Professional Engineers, the Los Angeles Professional Engineers' Society, the Society of American Military Engineers, and a senior member of the Amer-

ican Society of Appraisers (R. Tr. 1061). He had published several articles on valuation matters in the Handbook of the American Society of Appraisers and had lectured at various universities and professional societies on that subject. (R. Tr. 1061-62).

He had worked as a valuation engineer for the Appalachian Power Company (R. Tr. 1064) and had worked for various other concerns in the field of evaluating properties with technical qualities of an engineering nature (R. Tr. 1064-66). In the course of his occupation, he had been called upon to evaluate numerous utilities, including electric facilities, for various private concerns and governmental agencies (R. Tr. 1066-68). He had qualified and testified as an expert in evaluation problems in the courts of 17 states as well as various federal courts, tax commissions, and other commissions, both on behalf of private individuals and on behalf of governmental agencies (R. Tr. 1069).

After Mr. Vaughan had testified to his familiarity with the PUD properties being condemned (R. Tr. 1075-77), he testified that the highest and best use of the property was for a hydroelectric installation (R. Tr. 1078-79). He then testified that, because of the unique nature of the property, the basic approaches to estimation of value could not be utilized (R. Tr. 1081-84). The comparable sales approach, in particular, was inapplicable inasmuch as the witness was unable to find any sales of comparable properties (R. Tr. 1081-84).

After Mr. Vaughan had stated that, in his opinion, the fair market value of the properties and rights being condemned was the sum of $8,600,000 (R. Tr. 1100) and had testified as to the manner in which he reached that figure, the Court, upon motion of Seattle, struck the conclusion of money value reached by the witness, but permitted the balance of his testimony to stand in the record (R. Tr. 1282, 1338). The striking of this opinion of fair market value and the denial of an offer of proof with reference to Mr. Vaughan's testimony are the subject matter of specification of error number two.

The grounds urged in support of the motion to strike, and the offer of proof, are set forth therein. Due to its length Mr. Vaughan's testimony is set forth in the Appendix of this brief. (See App. pgs. 4-57)

Neville C. Courtney

The next PUD value witness was Neville C. Courtney, consultant engineer with the firm of Justin & Courtney, of Brooklawn, New Jersey. He was a graduate of the University of Pennsylvania with an AB degree and had completed two years of engineering at John Hopkins University. Mr. Courtney was a Fellow and a life member in the American Society of Civil Engineers, a member of the National Society of Professional Engineers, and a member of the International Congress of large dams. He was a registered engineer in the states of New Jersey and Pennsylvania and had been engaged in civil engineering for a period of fifty years, thirty-five of which had been in the field of

hydraulic and hydroelectric engineering (R. Tr. 1310-11). During the course of his experience, he had worked on the design and construction of various hydraulic and hydroelectric projects in various parts of the world (R. Tr. 1313-19).

One of the reasons Mr. Courtney was selected by PUD as an expert valuation witness was the District Court's pretrial ruling that PUD was entitled to have its properties and rights evaluated "as in the *Powelson* case, and in the *Grand River Dam Authority* case, for power site purposes." (R. HPO 132) In conjunction with his partner, Mr. Justin, now deceased, Mr. Courtney had either participated in the testimony or participated in the preparation of testimony regarding the valuation of the undeveloped dam sites in the *Grand Hydro* case (R. Tr. 1320-21) and in the *Powelson* case (R. Tr. 1322) which will be cited and referred to in the argument.

Mr. Courtney was also a principal valuation witness in the *Twin City* cases (R. Tr. 1322-24), which will be later referred to. The District Court referred to Mr. Courtney's qualifications as "tremendous." (R. Tr. 1496).

After Mr. Courtney had stated that, in his opinion, the fair market value of the properties and rights being condemned was the sum of $7,495,000 and had testified as to the manner in which he reached that figure, the Court, as had been done with reference to

the testimony of the witness Vaughan, granted Seattle's motion to strike that portion of Mr. Courtney's testimony which stated his opinion of value of the properties and rights being condemned. The striking of this testimony is the subject matter of specifications of error number three. The grounds in support of the motion to strike are set forth therein. Due to its length Mr. Courtney's testimony is set forth in the Appendix to this brief. (See App. pgs. 58-98)

While Mr. Courtney was on the stand, the PUD offered into evidence a copy of the transcript of the record of the *Grand Hydro case* in support of its argument that valuation testimony grounded on the same basis as that offered through the witness Courtney, had been accepted by the Supreme Court of Oklahoma and approved by the United States supreme court (R. Tr. 1519-21). PUD is advised that this transcript, bearing the designation Ex. D. I. 144, which it contends is in fact an admitted exhibit, is to be forwarded for filing in these appellate proceedings by way of supplemental transcript of record, together with the colloquy between Court and counsel at the time it was offered.

The Court invited the PUD to close its testimony and appeal from the record as it stood with the following comment:

> "We are about to recess, Mr. Klobucher, and I wonder if it would be worthwhile for me to make this observation:
>
> "Obviously the landowner in this case is not satisfied with the observations made on March

> 2nd. If the PUD intends to take the position throughout the case, and obviously it does, to value this land as though a plant were there, perhaps you might prefer to have the record stand as it is with reference to the valuation of the property.
>
> "Certainly, I am inviting a much more nominal valuation of the property than has been placed on it, and perhaps the PUD doesn't want that. I don't know, but I will leave that observation with you.
>
> "If you change the position of the PUD in connection with this matter by introducing other testimony, it may change the positions heretofore taken with reference to the present testimony on value, which I have rejected." (R. Tr. 1554-55).

The PUD then offered the testimony by written deposition of Jens Jensen and Roger H. McConnell, representatives of the mining interests in the Z Canyon-Boundary reach of the Pend Oreille River. This testimony revealed that the mining interests which would be affected by the construction of a dam at the Z Canyon site, although somewhat opposed to the construction of a high dam, were not opposed to the construction of a low dam at the Z Canyon site (R. Tr. 1592-94).

Prior to the close of its case, the PUD offered to prove through the testimony of its witness, John L. Vaughan, that the PUD's properties had a fair market value of $8,900,000 when appraised from a capitalization of income approach (R. Tr. 1627). This offer was made by the PUD as an alternative approach after the testimony of its two value witnesses regarding

their opinions of the fair market value had been stricken by the Court (R. Tr. 1627).

This would have been arrived at generally by computing the annual return from a completed hypothetical hydroelectric project on the properties and deducting the cost of the power as computed by previous witnesses. This income would have been capitalized to arrive at land value and discounted to arrive at the value of land and land rights in the present condition, taking into account the rights yet to be acquired. The validity of the value so computed would have been checked by comparing the cost of energy so produced with the cost of energy produced by other hydroelectric plants in the area (R. Tr. 1628).

The offer of proof was objected to by Seattle on the grounds that it was improper and unrealistic to capitalize the income from a hypothetical project which has not yet been constructed (R. Tr. 1629-30). The Court sustained the objection (R. Tr. 1630).

SEVERANCE

With reference to PUD's claim of damage to its Box Canyon properties and project caused by severing therefrom the downstream properties and rights, including the Z Canyon and Boundary dam sites, the following should be noted.

As hereinabove pointed out, PUD, in connection with its Box Canyon project, purchased all of the Cooper properties and rights on the river, including the rights

to overflow shore lands upstream from the Box Canyon dam, as well as the uplands, shore lands, and flowage rights downstream from Box Canyon that constitute the Boundary and Z Canyon sites and reservoir area. (See page 9, supra)

It was an admitted fact set out in the pretrial order that the properties and rights downstream from the Box Canyon dam, as well as Cooper's drawings, engineering data and development work, were acquired by PUD as a part of its plan for the development of a dam and power house at the Z Canyon site (R. 35).

Mr. Sewell, the engineer for PUD, testified:

> "The PUD, at the time of these plans, were acquired, was in the process of constructing Box Canyon dam, and in the studies of Box Canyon dam, there were certain deficiencies on waterflow, based on 20 year studies, from 1928 to 1948, and these deficiencies were the flow being too great and cutting down the head of the plant, until, in some years, the plant would have to go out of production entirely, and the PUD desired to build a plant at Z Canyon to coordinate with Box Canyon plant, and especially at the time of these deficiencies." (R. Tr. 447-48).

Upon motion of counsel for Seattle, this answer was stricken (R. Tr. 449).

Later, Mr. Campbell, manager of the PUD, was called as a witness, and an attempt was again made to establish that the properties being condemned in this action had been acquired with Box Canyon construction funds with the approval of the lender, R.F.C., at

the time of construction of the Box Canyon dam as additions and betterments thereto in that a dam and power plant at Z Canyon would not only be a source of power during periods of high water when the Box Canyon must shut down, it would make possible a co-ordinated operation during other times of the year (R. Tr. 889-946). Objections were made to this line of proof, including the objection that it pertained to the issue of severance damages which had been eliminated from the case at the time of the hearing on the pretrial order (R. Tr. 894).

An offer of proof in this respect was made and is set out verbatim in the specifications of error at page 48 infra. In rejecting the offer of proof, the Court ruled that the only proof that would be acceptable would be the actual contents of resolutions duly adopted by the Commissioners of the PUD and that Mr. Campbell's oral testimony would not be admissible to explain or add to the recorded actions of the Commissioners (R. Tr. 945-46).

Although the testimony of Mr. Sewell above set out had been stricken, the District Court, in rejecting Mr. Campbell's testimony, said:

> "Well, this matter has already been testified to by Mr. Sewell, you know, about the desirability of using Z Canyon to supplement Box Canyon power. But if you want this witness to explain the resolutions and what led up to them, I don't think it is proper, counsel." (R. Tr. 932).

and again said:

> "I think you have already established from Mr. Sewell what the purpose of it was.
>
> "I think his testimony is objectionable, counsel, and I will sustain the objection to the offer of proof." (R. Tr. 946).

At the close of the PUD's case, it will be seen that, due to the striking of the conclusions of value expressed by PUD's valuation witnesses, there was no valuation evidence in the record that included the element of power site value. As is demonstrated by the Findings of Fact, the PUD's evidence had been sufficient to establish that the highest and best use of the properties and rights being condemned was for hydroelectric power purposes (R. 93). The evidence also established that it would be necessary to acquire only a negligible amount of additional privately owned land in order to devote the PUD's properties and rights to the production of hydroelectric power, and that as concerns the proposed low Z Canyon project, such acquisitions could be made even though the developer did not have the right of eminent domain (R. 88, 95). Nevertheless, Seattle, having the right to open and close the testimony, did not in its rebuttal seek to offer any valuation evidence that considered this element of value (R. Tr. 1642-1756).

Following the close of the testimony and prior to entry of the Findings of Fact, Conclusions of Law,

and Judgment and Decree, the PUD moved the Court to reconsider the ruling striking the conclusions of value expressed by its valuation witnesses (R. 48-50). In denying the motion, the Court expressed the opinion that the only method available to the PUD to prove value was by proof of comparable sales (R. MTR).

Following the entry of the Judgment and Decree, awarding Seattle's opinion of value in the amount of $16,000 as just compensation, PUD moved for a new trial on the grounds therein set forth (R. 100). This motion was denied (R. 105). PUD appealed (R. 106). Seattle cross-appealed (R. 109).

Specification of Error No. 1

Although PUD's ownership included all or practically all of the privately held lands and rights necessary for the development of a hydroelectric project with the dam, power house and related facilities located at either the Boundary site or the Z Canyon site, the District Court erroneously struck from the record the evidence submitted with reference to a project at the Boundary site.

PUD's witness, Allen, was permitted to testify that Seattle was, as of the date of taking, executing its plans to complete a hydroelectric project at the Boundary site utilizing shore lands, uplands and flowage rights owned by PUD. He was also permitted to testify as to the cost and capacity of such a project at the Boundary site based on actual data furnished voluntarily by Seattle or supported by public record and checked by the witness (R. Tr. 574-712, 715-16). The

place, he states that the report was written before he even visited the site.

"We, therefore, feel that, even outside of our other objections, which we feel are well taken, that the exhibit is not properly qualified." (R. Tr. 627-28).

The Court sustained the objection and rejected the exhibit on the ground that it came too close to the rule that rejects evidence of value of the property to the condemnor (R. Tr. 629). PUD then made the following offer of proof:

"MR. ENNIS: The defendant PUD offers to prove by the testimony of Mr. Allen and Exhibit 130 that as of the date of trial, which is the date of taking, Seattle has completed plans and designs for a dam and powerhouse at the Boundary site and is executing those plans. This evidence is for the purpose of establishing the highest and best use of the PUD properties in the Z Canyon-Boundary area of the Pend Oreille River.

"PUD will further offer to prove the cost of the project proposed and being built by Seattle as of the date of taking and the capacity of the dam and powerhouse so proposed. This testimony will be based upon actual data supporting Seattle's estimates and actual contracts entered into by Seattle which are a matter of public record or have voluntarily been supplied by Seattle and checked by Mr. Allen. The evidence will be offered as a typical project that could be built on the property in question at low cost and high capacity which goes directly to the availability of the PUD properties for that purpose.

"This offered proof does not show any enhancement of value by reason of anything done by Seattle, the condemnor, and is therefore not made inadmissible by *U. S. vs. Miller.*

"This evidence is not in any sense offered to prove any special value to Seattle as an element of market value, but is solely for the purpose of establishing by other and later witnesses that the use of the property for a power site is economically feasible and thus will be evidence going directly to proof of the highest and best use of the property. Such evidence is admissible under the rationale of the U. S. Supreme Court opinion of *Grand River Dam Authority vs. Grand Hydro,* Its admissibility is also supported by *Metropolitan Water District vs. Adams* and other authorities cited in Part Two of PUD's trial brief.

"For the purposes of showing adaptability of the property for power site purposes and the reasonable possibility of the properties being used for that purpose, the defendant should not be confined to evidence pertaining to its own planned project. A purchaser of the PUD properties might and probably would consider the availability and possibilities of the Boundary site as well as the Z Canyon site. For this reason, testimony with reference to the Boundary project is admissible." (R. Tr. 719-720)

This offer of proof was rejected (R. Tr. 721).

The Court erred:

(a) In limiting consideration of power site value to PUD's properties and rights at the Z Canyon site, which is one mile upstream from, and will be inundated by the reservoir of, Seattle's dam at the Boundary site;

(b) In striking the testimony of PUD's witness, Arthur E. Allen, relative to the cost and capacity of a power project on the properties owned by the PUD

at the Boundary site which are included in this condemnation action:

(c) In rejecting PUD's Exhibit for Identification 130; and

(d) In rejecting PUD's offer of proof quoted above.

Specification of Error No. 2

The Court erred in striking the opinion of value of the properties and rights being condemned as expressed by the witness, John L. Vaughan, in the amount of $8,600,000.00, and in rejecting the offer of proof hereinafter set out in full.

After stating his qualifications and during his direct examination wherein the manner in which he arrived at his opinion of value was stated in detail, the witness, Vaughan, testified:

> "In my opinion, the fair market value of the entire property before the taking, is $8,702.200.
>
> "The fair market value of the property remaining after the taking is $2,200, so the value of the property taken, is $8,700,000." (R. Tr. 1097.)
>
> "So, I have made a judgment allowance of $100,000 for the possible cost of acquiring these additional rights, and I have reduced my estimate of value from $8,700,000 to $8,600,000." (R. Tr. 1100).

During the course of cross examination of the witness, Vaughan, the Court said:

> "Now, the valuation has to be based upon fair market value, what a willing buyer would pay to a willing seller. He hasn't based his opinion on

that, and so if counsel wants to make his motion to strike, I will entertain it now." (R. Tr. 1236)

Seattle immediately moved to strike the testimony of the witness (R. Tr. 1235) on the grounds:

"No. 1, the witness has not used the proper approach to a fair market value valuation, in that he has simply taken a comparison of other hydroelectric projects and the costs incident to them from a document which is replete with second and third-hand hearsay, and using those figures, those hearsay figures, which do not come within the ambit of the standard kinds of hearsay which an appraiser is permitted to rely upon, has arrived at a project comparison calculation by which he, in essence, arrives at a figure which he believes, on the strength of what was paid at other projects in the Northwest and on the West Coast, a purchaser could pay for these PUD properties. Instead of being a figure based on comparables or on any other acceptable appraisal technique, the witness, relying on this hearsay information contained in this document, in essence, has told us what, in his opinion, a purchaser could pay for these properties, and on the ground that this is an improper appraisal technique from a legal standpoint, and on the ground that the basis which the witness used provides an insufficient legal foundation to support the opinion which he has given, we move to strike that opinion in its entirety." (R. Tr. 1236-37)

"It is also obvious, your Honor, from the very projects that the witness has now named that he used for comparison purposes, that the value he used are values paid by condemnors all over the Northwest, values which are the result of condemnation awards after jury verdicts, values which included attorneys' fees and court costs in connection with such condemnation, values paid by condemnors who settled the condemnation actions by

negotiating after they were started, all of the myriad of things which occur whenever a project such as those he has relied on goes through the land and land rights acquisition process." (R. Tr. 1239).

The Court granted the motion to strike to the extent of striking the testimony quoted above (R. Tr. 1338).

PUD made the following offer of proof:

"MR ENNIS: We would offer to prove — I am trying to couch this — what we have offered to prove, what we think the witness already has testified to, but I will make it in that fashion, that we would offer to prove, and offer further that the proof of this witness already is, to the effect that he arrived at a money value of fair market value in this case as that value that would be agreed upon between a willing buyer and seller, as he described that, not taking into consideration the existence of a license, the existence of ownership of water rights on the river, or the existence of ownership of anything other than the lands that the PUD owned, and that he has referred to those lands as a bundle of rights that he thought had a value; that he arrived at an opinion of market value considering as one of the elements on the basis of what the highest and best use was, and that he then deducted from his original conception of what the value might be and expressed his opinion of value on the land in the condition that it is in, realizing that these other matters existed and that any reasonable buyer would have to acquire these, and so that he did not include them, he did not include the ownership of those things by the PUD or a purchaser in arriving at value; that the opinion of value he arrived at was exclusive of those; and we would offer that in the way of proof." (R. Tr. 1284-86).

The Court rejected the offer of proof. (R. Tr. 1286).

A consideration of this assignment of error requires a review of testimony of the witness, Vaughan, upon which his stricken opinion of value was based. This testimony is lengthy and, for convenience of this Court, the witness' testimony on direct examination, except with reference to his qualifications, and pertinent portions of his cross-examination are set out in the appendix of this brief. (See Appendix pgs. 4-57)

Specification of Error No. 3

The Court erred in striking the opinion of value of the properties and rights being condemned as expressed by the witness, Neville C. Courtney, in the amount of $7,498,000.

After stating his qualifications and during his direct examination wherein the manner in which he arrived at his opinion of value was stated in detail, the witness, Courtney, testified as follows:

> "Q. (By Mr. Dill) What valuation did you put upon this property as a raw dam site, as an undeveloped dam site, along with the other properties of the PUD in the river?
>
> "A. The amount of money in cash, as the fair market value, is $7,500,000 before the taking, and $7,498,000 after the taking. I valued the 191 acres — or the 110 acres, after the taking, as $2,025, which I rounded out at $2,000." (R. Tr. 1398-99).

Seattle moved to strike the opinion of the witness quoted above as to the fair market value of PUD's properties in the following manner:

> "MR. WHITE: Your Honor, it appears now from Mr. Courtney's testimony that he used almost precisely the method which your Honor rejected in connection with the witness Bleifuss, and I refer to Defendant's Exhibit 134, which is the same curve, which Mr. Courtney has now explained for us in words, which Mr. Bleifuss had as a line. He had on the lefthand column, you will remember, the mills per kilowatt-hour, and across the bottom, cost of lands and rights, millions of dollars, and showed what the interrelationship would be between what might be economically justifiable for the cost of land and land rights and how it affect the cost of power, and, in my judgment, the technique which Mr. Courtney has now said that he used is subject to exactly the same disabilities which we raised at the time of Mr. Bleifuss' testimony.
>
> "It necessarily, of course, entails some, let's say, second-hand approach of capitalization of earnings, as Mr. Bleifuss approached it, since the direct line would be meaningless without having the mills per kilowatt-hour compared with some other project, which are unidentified, and we move to strike Mr. Courtney's testimony as to value on several additional grounds.
>
> "First, that to this point, there has been no showing that the lands necessary for the construction of a project at Z Canyon could be assembled within the reasonably near future without the power of condemnation. And your Honor adverted to that fact and that state of the record as late as yesterday, and nothing, of course, that Mr. Courtney has done or any study that was made by him — although it might have been made by him, it

hasn't been made — nothing Mr. Courtney has done changes that record.

"Next, we would add an additional ground, that Mr. Courtney has, in his testimony this morning, indicated that he took into consideration the factor, assumed, that the PUD would have the right to store the waters of the Pend Oreille River and also to divert them through penstocks and intake structures through the powerhouse, and this was, I think, a very significant factor which your Honor discussed in connection with the ruling which you made upon our motion to strike Mr. Vaughan's testimony.

"Now that we have out in the record the back-up, so to speak, for the figure of seven and-a-half million dollars, it appears that Mr. Courtney's testimony should not be permitted to stay in the record.

"I recognize that he also said something about using the total land in relation to the cost of the project, which I can only interpret from this previous testimony as meaning that he used this comparative approach, using the projects which he named, and he said this morning that he used substantially the same approach as was described by Mr. Vaughan, and, as Mr. Helsell said yesterday, the two principal problems with that approach are, first, that it is based upon compound hearsay and, second, it is based upon wholesale consideration of transactions which your Honor could not consider one by one. In other words, it is trying to get into the record a great many transactions involving condemnors and condemnees which would not be admissible if they were presented on a comparable sales basis, and the mere fact that they are more or less homogenized or averaged in order to come at some figure which might take out the sting of a particular one, it seems to me all it does is compound the inadmissibility, because we couldn't pos-

sibly know what went into all of these transactions without doing what we explained yesterday would be necessary to do, to call the Comptrollers of the various utilities in question and find out from them the facts concerning these transactions.

"Basically, too, Mr. Courtney's approach is what a dam owner could pay, rather than what he would pay. In other words, he had equated the two between 'could' and 'would' without really any adequate explanation of how he gets from 'could' to 'would.' In fact, as he describes it, there really is no judgment factor other than his picking a particular point out on a curve, which I gather is a point which he feels would be what a prospective dam proprietor could pay and still have the project competitive and reasonably attractive, rather than what the actual value of these properties which we have in litigation here is." (R. Tr. 1460-64).

In ruling on the motion, the Court said:

"I think that this testimony is not fundamentally sound, counsel, on the matter of value. It isn't a comparable sale approach, it isn't a capitalization approach, which you said was not to be used, or Mr. Ennis did. Of course, it can't be a reproduction cost approach.

"I think there has to be some basis upon which an amount is determined, and to place it on the basis of taking a piece of raw land and theoretically building a plant and theoretically selling the power becomes a pyramiding on nothing, on the raw land, and there is no plant there. I think this is testimony that cannot be used, as I view it, recognizing the tremendous qualifications of this man." (R. Tr. 1495-96).

A consideration of this assignment of error requires a review of the testimony of the witness, Courtney,

upon which his stricken opinion of value was based. This testimony is lengthy and, for the convenience of the Court, pertinent portions thereof are set out in the appendix of this brief. (See Appendix pgs. 58-98)

Specification of Error No. 4

PUD established in its case that the highest and best use of the properties and rights being condemned was for hydroelectric power purposes (R. 93) and that their use for that purpose was reasonably probable (R. 88, 89, 93, 95). PUD also established that it had acquired the said properties and rights for use in the development of water power and that Seattle is acquiring them for that purpose. The Court found that the valuation expressed by Seattle's valuation witnesses in Seattle's case in chief ignored the element of power site value (R. 94). After the conclusion of value as expressed by PUD's valuation witnesses had been stricken, Seattle proceeded with its closing case and failed and refrained from offering evidence of value which considered the element of power site value (R. Tr. 1624-1756).

Considering the posture of the case upon its completion, the Court erred in entering a judgment and decree in condemnation which contained an award that admittedly did not constitute just compensation.

Specification of Error No. 5

Following the close of the testimony and prior to entry of Findings of Fact, Conclusions of Law, and

Judgment and Decree, PUD moved the Court to reconsider the ruling striking the conclusions of value expressed by its valuation witnesses. In denying this motion, the Court said:

> "I thought that the valuations placed on the properties by the valuation witnesses presented by the PUD were not on a fundamentally correct basis. I felt that the only basis upon which the property could be valued was on the basis of comparables or opinion evidence based upon some comparable properties." (R. MTR)

The Court erred in denying PUD's motion to reconsider above referred to.

Specification of Error No. 6

The Court erred in its pretrial ruling that PUD could not submit evidence as to severance damage; and during trial, by adhering to the pretrial ruling, the Court compounded the original error.

At the hearing on the pretrial order, PUD proposed to be permitted to offer evidence of severance damages by showing how the PUD's planned use of the properties taken would, among other things, firm up the loss of power at its Box Canyon dam which high water causes each year, and that, therefore, the taking of that property would substantially reduce the value of the remainder of its power production properties. Seattle, in its pretrial brief, objected, claiming the taking of the property was simply frustration of PUD's plan to construct a dam at Z Canyon. The Court ruled that "there should not be submitted to

the jury any evidence on the question of severance damages." (R. HPO 133.)

As pointed out in the statement of the case (p. 30, supra), the Court compounded its pretrial error by striking the testimony of PUD's engineer, Sewell, wherein he pointed out that studies he had made in connection with PUD's Box Canyon dam showed that high water would reduce power production and finally cause the Box Canyon plant to go out of operating production. the witness testified that it was planned to use the excess power which the high water could be made to produce at a Z Canyon plant to meet the deficiencies at Box Canyon.

The motion to strike Mr. Sewell's testimony in this regard was made and sustained on the ground that such planning by the PUD could only be proven by official resolutions of PUD Commissioners and not by the PUD Engineer. (R. Tr. 448-9).

The pretrial error was again compounded when the Court, because of Seattle's objections, including the objection that it pertained to severance damages (R. Tr. 894), refused to permit the PUD to establish, through its manager, V. P. Campbell, that the properties being condemned in this action had been acquired with Box Canyon construction funds with the approval of the lender, R.F.C., at the time of construction of the Box Canyon dam as additions and betterments thereto in that a dam and power plant at Z Canyon would not only be a source of power during periods of high

water when the Box Canyon must shut down, it would make possible a coordinated operation during other times of the year (R. Tr. 889-946).

PUD made the following offer of proof:

> "In view of counsel's statement that the City of Seattle would now contend that the PUD could not legally proceed with the development of Z Canyon project, the PUD would offer to show that at the time of the acquisition of the Z Canyon properties, the commissioners were aware of a continuous deficiency in the Box Canyon project, in that in periods of high water, the Box Canyon project would have to shut down; that the commissioner is determined to firm up this deficiency by adding the Z Canyon project to its program and coordinate it with the Box Canyon project: that the commissioners had authorized studies and had estimates of future power needs of the District which justified their plan; that they were aware that the Z Canyon project could be built in stages, and its capacity increased from time to time; that it purchased the Z Canyon project with funds which were authorized from the Box Canyon project, with the approval of the RFC, who were supplying the funds originally; after the RFC made its own engineering investigations and determined that the proposed Z Canyon project was in fact a contemplated extension of the Box Canyon development." (R. Tr. 938-39)

The Court continued the error by rejecting the offer of proof and ruled that the only proof that would be acceptable would be the actual contents of resolutions duly adopted by the Commissioners of the PUD and that Mr. Campbell's oral testimony would not be admissible to explain or add to the recorded actions of the Commissioners (R. Tr. 945-46).

Specification of Error No. 7

The PUD moved for a new trial on the following grounds:

> "1. The Court erred in admitting and considering the testimony of plaintiff's witnesses as to the fair market value of the land in question.
>
> "2. The Court erred in refusing to admit the testimony of defendant's witnesses as to the fair market value of the land in question.
>
> "3. The judment is contrary to law in that it does not afford the defendant just compensation for the taking of its property." (R. 100)

This motion was denied (R. 105).

The Court erred in denying PUD's motion for new trial.

ARGUMENT

Part I. of this brief will discuss the admissibility of evidence with reference to the valuation of the properties and rights being condemned and the propriety of entering a judgment and decree based upon the valuation estimates submitted by Seattle which failed to consider the highest and best use of the property. This will include a consideration of Specifications of Error 1, 2, 3, 4, 5, and 7. Part II. will discuss the rulings of the Court with reference to the PUD's claim of severance damage and will include a consideration of Specifications of Error 6 and 7.

PART I.

Briefly stated, it is the position of PUD that the Findings of Fact and Conclusions of Law entered in this case (R. 80-95) clearly establish that this action involves the condemnation of all or practically all of the private lands and rights in, on and along a navigable stream constituting an integrated site uniquely adaptable, sufficient, and proven to be suited as the location for a dam, power house, and reservoir area whereat hydroelectric power and energy could be produced in quantity, at a very low cost. The Findings of Fact and Conclusions of Law also establish that PUD not only acquired the lands and rights for such purposes, but had completed plans for a hydroelectric project and was prepared to carry them out; and it is reasonably probable that, but for the taking of the properties and rights, the PUD or its purchaser would have done so in the the reasonably near future. Under such circumstances and when, because of the unique character of the integrated properties and rights, there are no comparable sales for the witnesses to consider in the determination of market value, the methods used by PUD's valuation witnesses to arrive at an opinion of value were proper; and their conclusions of value should not have been stricken.

— — — — —

The District Court ruled at the pretrial hearing that PUD was entitled to have its lands and rights "evaluated as in the *Powelson* case and in the *Grand*

River Dam Authority case for power site purposes." (R. HPO 132).

At the trial the Court took the position that the only method available to prove such value was by proof of comparable sales. In ruling on PUD's motion to reconsider the order striking the conclusions of value expressed by the witnesses Vaughan and Courtney, the Court said, "I felt that the only basis upon which the property could be valued was on the basis of comparables or upon evidence based upon some comparable properties." (R. MTR). In order to afford an idea as to value, compared property must be truly comparable; it must be located in the same geographical area; and the sale must be reasonably near in time. Under the Court's view and even though it was established, as it was in this case, that the highest and best use of the properties being taken was for power site purposes inasmuch as they were uniquely adaptable as the site for a low-cost, high-capacity hydroelectric project, PUD would be deprived of just compensation unless it could produce evidence of a sale or sales reasonably near in time and location of all or practically all the privately owned lands on and along a navigable stream similar in flow to the Pend Oreille River that would be needed to serve as the site of a hydroelectric project that could be built, maintained, and operated at a cost and with a production capacity similar to the cost and capacity of such a project as could be built, maintained, and operated on the PUD lands. There are, of course, no properties and rights

so meeting the test of comparability that have been sold as a unit; and the witnesses so testified (R. Tr. 1083, 1339).

The non-existence of comparables is graphically demonstrated by the following colloquy that took place between the Court and counsel for Seattle at the time of the settlement of the Findings of Fact on January 20, 1965, when reference was being made to the Z Canyon and Boundary sites:

> "THE COURT: Do you know of any place in the Northwest where there are two power sites this close together as these two are? And as good as these two?
>
> "MR. WHITE: As close together and as good?
>
> THE COURT: Yes.
>
> "MR. WHITE: Well, I don't know. I suppose there are but I can't think of any offhand." (R. PCF 17).

In addition to the shore lands and uplands owned in fee simple which are included in the property being taken, a comparable situation would have to also include the right owned by PUD and evidenced by Exhibit P. 1. This right was a perpetual right granted by the State of Washington in 1913 pursuant to the provisions of Chapter 125 of the Sessions Laws of 1907, which authorized the granting of rights

> "to perpetually back and hold water upon and over any land belonging to the State of Washington, and to overflow any such land and inundate the same, if it be necessary in the erection, construction, maintenance, or operation of any water

> power plant, reservoir or works for impounding water for power purposes . . . " (This act is set out in full in the appendix at p. 99)

The state-owned shore lands affected by the grant extend on both sides of the Pend Oreille River upstream from the Z Canyon site a distance of some 17 miles to the Box Canyon site. From the physical feature of Metaline Falls in the river upstream to the Box Canyon dam, the outer boundaries of the shorelands coincide with the outer boundaries of the reservoir area for the Boundary dam project. (Exs. P. 12-13-14-15)

At the time of the issuance of the order, the State of Washington was not only the owner of the shore lands, it was the owner of the waters of the Pend Oreille River. (*Port of Seattle v. Oregon & Washington Railroad Company et al.,* 255 U. S. 56). This perpeutal right was created prior to the adoption in 1917 of a code in the State of Washington establishing appropriation rights and procedures, and no other state grants were then necessary in connection with the erection and operation of a dam in the Pend Oreille River and the use of the waters thereof for water power purposes. In *State ex rel. Mason County Power Company v. The Superior Court,* 99 Wash. 496, 169 P. 994, the Court, in referring to the 1907 laws, said at p. 498 of the Washington report:

> "We find no other statute in the laws of this State permitting either a corporation or a private individual to acquire State lands or any rights therein for the same purpose as those involved herein."

The first section of the water code above referred to declares the rights and procedures established by such code to be subject to existing rights. (RCW 90.03.010).

The creation of this perpetual right also preceded the enactment of the Federal Power Act in 1920. Section 27 of this Act, 16 USCA 821, reads as follows:

> "STATE LAWS AND WATER RIGHTS UNAFFECTED.
>
> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the *control,* appropriation, use, *or* distribution of water used in irrigation or *for municipal or other uses, or any vested right acquired therein.*" (Emphasis supplied.)

It is said in *Federal Power Com. v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 98 L. Ed. at page 671 of the L. Ed.:

> "The most significant issue raised by this case is whether the Federal Water Power Act of 1920 has abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. We agree with the Court of Appeals that it has not."

and again at page 676:

> "The issue is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use water of the Niagara River."

The fact that the case at bar involves valuable perpetual rights created fifty years ago, saved to the owner by both the Washington water code and the Federal Power Act, as well as the fact that the site has an exceptionally unique terrain and river profile which permits the concentration of head on a stream with ample flow, demonstrates most clearly why the situation is incomparable.

In adhering to the proposition that there are only three approved methods of valuation in condemnation; namely, capitalization of income, reproduction cost, and comparable sales (R. Tr. 1495), and that the comparable sales approach was the only one available to the PUD in this case (R. MTR), the District Court failed to recognize that over the years the concept of market value and the methods of determining just compensation have undergone considerable evolution, particularly with reference to unique properties and rights.

The following statement by Justice Frankfurter in *Kimball Laundry Co. v. U. S.*, 338 U. S. 1, at page 6, is often quoted:

> "But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place. If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the 'market price'

becomes so important a standard of reference. *But when the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value,* including even value to the owner as indicative of value to other potential owners enjoying the same rights." (Emphasis supplied).

The Court said in *United States v. Cors,* 337 U. S. 325, at 332:

"The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. *United States v. Miller,* 317 U.S. 369, 374 But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases."

The Seventh Circuit Court of Appeals said in *United States v.* 93.970 *Acres,* 258 F. 2d 17, at p. 28:

"The general rule undoubtedly is that just compensation is to be determined by the fair cash market value of the property at the time of taking. The cases, however, recognize that this rule cannot be adhered to in situations where the property taken is unique. See *United States v. Two Acres of Land,* 7 Cir., 144 F. 2nd 207; *City of Chicago v. Farwell,* 286 Ill. 415, 121 N. E. 795; *Sanitary District of Chicago v. Pittsburgh, Ft. Wayne and Chicago Ry. Co.,* 216 Ill. 575, 75 N.E. 248, and *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463."

This Court in 1957 said in the case of *Phillips v. United States,* 243 F. 2d 1, at p. 2:

"Never niggardly in its standards for the compensation of the expropriated landowner, the Supreme Court has grown progressively more liberal in its canons for the reimbursement of those

> who are dispossessed through the exercise of the right of eminent domain."

In *Washington Water Power Co. v. U. S.,* 135 F 2d 541, wherein the manner of proving the valuation of undeveloped property useful for power site purposes was being discussed, this Court also said at p. 542:

> "The property in question is the kind where actual sales cannot be used as the basis for ascertaining 'market value.' In such cases appraisals are made and the jury decides from the various appraisals and other evidence, what the 'market value' is."

After the District Court had ruled at the pretrial hearing that PUD was to be permitted to prove power site value as an element of value of its properties and rights (R. HPO 132), PUD set out to make such proof in the same way as had been done in other cases hereinafter cited that involved the valuation of undeveloped hydroelectric power sites. Is should be remembered that the Z Canyon site was in fact partially developed in that its suitability to support a dam had been established by tunneling and test drilling. (R. Tr. 435, Ex. D. 112).

In preparing for trial and offering its proof of valuation, PUD gave careful consideration to the *Twin City* litigation above referred to. This litigation involved practically all of the land needed for the development of a power project having a sixty-foot head. These undeveloped lands extended eleven miles along both sides of the Savannah River and were located in the States of Georgia and South Carolina. For this

reason, the litigation involved court proceedings in the Western District of South Carolina, the Southern District of Georgia, the United States Court of Appeals for both the Fourth and Fifth Circuits, as well as in the United States Supreme Court. This litigation is found in the following citations: *U. S. v.* 1532.63 *Acres et al,* 86 F. Supp. 467 (1949); *U. S. v.* 3928.09 *Acres et al.,* 12 F. RD 127 (1951); *U.S. v.* 3928.09 *Acres of Land et al.,* 114 F. Supp. 719 (1953); *U.S. v. Twin City Power Co. et al.,* 215 F. 2d 592 (CCA 4th Cir., 1954); *U.S. v. Twin City Power Co. of Georgia,* 221 F. 2d 299 (CCA 5th Cir., 1955); *U.S. v. Twin City Power Co.,* 350 U.S. 222, 100 L. Ed. 240, 76 Sup. Ct. 259 (1956).

Except that in the *Twin City* cases the condemnor was the United States and the site was suitable for a development of a project with a 60 foot head as distinguished from a head of 255 feet at the Z Canyon site and a 261 foot head at the Boundary site, the facts in *Twin City* are in many respects similar to the facts in the case at bar. The facts in *Twin City,* including the manner in which the undeveloped power site properties and rights were evaluated and appraised, are set out at length and in detail in the District Court and Circuit Court of Appeals decisions above cited. A careful review of these opinions and the excerpts from the Report of Commissioners, direct testimony of owners' valuation witnesses, and accompanying exhibit, which are contained in the appendix to this brief, is respectfully urged. (See Appendix pgs. 100-150)

It will be seen that in *Twin City* the valuation witnesses, with the approval of the Commissioners and the District and Circuit Courts of Appeal, did the very thing in arriving at opinions of value which the District Court in the case at bar found to be objectionable. After concluding that the highest and best use of the undeveloped properties considered as an integrated unit was for power site purposes, the witness, Dr. William P. Creager, whose qualifications are also tremendous, listed 19 factors which he took into consideration (Appendix pgs. 118-121). He not only considered the cost of construction of a hydroelectric plant exclusive of the cost of site, its capacity, and the cost of producing power, he did the same thing for a hypothetical steam plant. As shown in the Commissioner's report (Appendix pgs. 100-108). Dr. Creager determined that the annual cost of producing hydro power at a contemplated project on the undeveloped lands was $139,000 less than the annual cost of producing a like amount of power by steam. He capitalized this sum at 6 percent, which gave the potentially-integrated power site a theoretical value of approximately $2,300,000. (Appendix pgs. 105-106. From this figure, the witness deducted $700,000 "to cover fluctuations in market, the risk that a prospective developer of this project would have to take, fluctuations in demand for power, additional lands that would have to be acquired to complete the project, and other factors best known" to him and arrived at an opinion of value in the amount of $1,600,000. (See Appendix

page 106). The Commissioners concluded, "In our opinion, this represents a sound basis for arriving at the value of the lands taken from Twin City, and the just compensation to which it is entitled . . . " (Appendix pgs. 106-107).

The witness, Johnson, explained Ex. 40 (Appendix pgs. 124-128). In his consideration of his opinion of value, this witness, as did Mr. Vaughan in the case at bar, calculated the annual land cost per kilowatt installed capacity of 11 plants in the Santee River System and arrived at an average land cost per kilowatt installed capacity. By comparing this with the installed capacity of a proposed project on the Twin City site, the witness determined that his opinion of value of $1,500,000 was completely justified. (Appendix pgs. 136, 151).

A comparison of Mr. Courtney's testimony in *Twin City* (Appendix pgs. 136-150) with his testimony in this case (Appendix pgs. 58-98) will show that he used a similar approach in arriving at his opinion of value.

It is recognized that the United States Supreme Court reversed the District Courts and Circuit Courts of Appeal decisions in *Twin City*. This was due to the opinion held by the Supreme Court that the doctrine of dominant servitude over navigable streams held by the United States made it improper to require the federal government to pay anything for power site value. However, the manner in which that value had been arrived at by the Commissioners and approved

by the District Courts and Circuit Courts of Appeal was not disturbed.

The *Grand Hydro* litigation, referred to as a proper guide for valuation by the District Court at the pretrial hearing herein, is found in the following citations: *Grand-Hydro v. Grand River Dam Authority,* 139 P. 2d 798; *Grand River Dam Authority v. Grand Hydro,* 201 P. 2d 225; *Grand River Dam Authority v. Grand Hydro,* 335 U.S. 359, 93 L. Ed. 64, 69 Sup. Ct. 114.

The Grand Dam Authority, holding a permit from the State of Oklahoma to build the Pensacola hydro on the Grand River, filed a declaration of intent under the Power Act on which the Commission determined on February, 11, 1938, that interstate commerce would be affected and, therefore, a F.P.C. license was required.

In February, 1939, it started this condemnation suit under state law to acquire 1400 acres of land, which included the dam site. The F.P.C. license was issued on July 26, 1939.

Commissioners made an award of $280,000.00. Both sides appealed. The jury found $136,000.00. On the landowners' appeal, the Supreme Court reversed (192 Okla. 693, 139 P. (2d) 798) for the following reason:

> "Grand Hydro pursued the proper course for determining the market value of the land. It produced witnesses qualified to give their opinion as to that value from the standpoint of adaptability of the land to every use which Grand Hydro might reasonably employ the same. Among those uses

was that of dam construction for the development of hydro-electric power for public use. Grand Hydro produced qualified witnesses who gave their opinion as to the market value of the land for the latter purpose, but their testimony was withdrawn by the court and the jury admonished not to consider the same. The ground assigned for such procedure was that the adaptability of the land to damsite purposes was not an element of market value. In this the court erred."

The retrial resulted in a judgment on a jury verdict of $800,000.00. The State Supreme Court (201 P. (2d) 228) affirmed, saying:

"The testimony of the expert witnesses as introduced was, therefore, competent to prove the dam site value of the property and was in accord with our opinion on the former appeal. To the same effect is the California case of Metropolitan Water Dist. of Southern California v. Adams et al., Cal. Sup., 116 P. 2d 7, wherein there is an extensive discussion of many of the points herein involved and a collection of many authorities on the subject."

In affirming the Oklahoma Supreme Court, the United States Supreme Court said at p. 361 of the U. S. Report:

"The federal question in this action for condemnation under Oklahoma law is whether the Federal Power Act had so far affected the use or value of certain land for power site purposes as to render inadmissible expert testimony which gave recognition to that land's availability for a power site. We hold that it had not. We thus see no adequate reason to reverse the Supreme Court of Oklahoma which had held that such testimony was properly admitted in a state condemnation proceeding."

At p. 369 the United States Supreme Court quotes that portion of the opinion of the Oklahoma Supreme Court with reference to the competency of the testimony of the expert witnesses which is hereinabove set out.

The testimony of the *Grand Hydro* valuation witnesses is contained in the document designated as D-I-144 and submitted to this Court under Supplemental Designation of Contents of Record on Appeal. It will be noted that the verbatim testimony of the valuation witnesses was before the U. S. Supreme Court in the *Grand Hydro* litigation. Portions of this testimony selected as pertinent are included in the Appendix (Appendix pgs. 152-199). A comparison is urged of the manner in which these witnesses arrived at their opinions of value with the manner in which the witnesses in the case at bar arrived at their valuation opinions. When this is done, it will be apparent that, although the methods used are in many respects similar, the testimony of the witnesses Vaughan and Courtney is more practical and acceptable and more within recognized standards in this regard than was the testimony in the *Grand Hydro* litigation.

The Supreme Court in *Grand Hydro,* at p. 372 of Vol. 335 of the U. S. Reports, said:

> "The present large development of this site by the petitioner under a federal license is *convincing proof of the value and availability of the land for that purpose.*" (Emphasis supplied.)

plan to subdivide the land for dwelling, business, and truck garden sites, which, according to the owner's witnesses, was the highest and best use of the land. These witnesses arrived at their opinions of value by capitalizing the estimated income from the land assuming it had been improved as a subdivision. This Court held such valuation testimony to be admissible because the use of the land as testified to was a "use for which the property is adaptable and needed or likely to be needed in the reasonably near future." As shown by the evidence, the Findings of Fact and Conclusions of Law, the case at bar comes within the rule stated in the cited case. Nevertheless, the District Court refused to permit similar testimony (R. Tr. 1627).

Additional authorities supporting the manner in which Mr. Vaughan and Mr. Courtney arrived at opinions of value are *U. S. v.* 25.406 *Acres of Land,* 172 F. 2d 990 (CCA 4th), and *Metropolitan Water District v. Adams,* 116 P. 2d 7.

Part I. of this brief will be concluded by pointing out that when the PUD in its case established that the highest and best use of its lands and rights was for power site purposes and that this use was sufficiently probable as to affect the market value of the property, and particularly after the conclusions of value as expressed by PUD's witnesses were stricken, it was then incumbent upon Seattle in rebutting the PUD's case to place in the record evidence of value which took

into consideration the highest and best use of the property. Its failure to do so leaves a void in the evidence which makes it impossible for the Court to make an award for the taking of property in accordance with the Fifth Amendment to the Constitution. It was said in *U. S. v. Twin City Power Co.,* 215 F. (2d) 592, at 596:

> "It is provided by the Fifth Amendment to the Constitution of the United States that private property shall not be taken for public use 'without just compensation'; and in arriving at just compensation *all elements entering into the value of the property taken must be given consideration.* The most profitable use of the land here being taken is use in the development of water power; and there is no basis in law or in reason why this element of value should be ignored. The land was acquired by the owner for that purpose; and it is now being acquired by the United States for that purpose." (Emphasis supplied.)

PART II.

SEVERANCE

There was error in the Court's ruling in the Pre-Trial Hearing that no evidence be submitted on the question of severance damages (R. HPO 133).

The pre-trial error was the basic error on this subject. Adherence to that error caused the court to commit a number of errors as the trial progressed that compounded that error. The prohibition against *submission* of evidence on the question of severance damages was made before any evidence had been offered.

The Court could not possibly be aware of all the facts necessary to such a ruling.

This ruling conflicts with the general rule that when the taking of the property of an owner reduces the value of the part remaining, severance damages should be awarded. 4 *Nichols, Eminent Domain* 839, *Sec.* 1545, Partial Taking of a Utility; 29 CJS, Eminent Domain, sec. 140; *West Virginia Pulp and Paper Co. v. U. S.,* 200 F. (2d) 100 (4th Circuit); *U. S. v. Sharp,* 191 U.S. 549; and *U.S. v. Pope and Talbot, Inc.,* 293 F. (2d) 822 (9th Circuit) 1961; *Campbell v. U.S.,* 266 U.S. 368). The Court should first hear the evidence to determine whether or not the rule applied.

This exclusion of evidence was in direct conflict with the salutary and sensible prononuncement of the United States Supreme Court in *United States v. Sharp,* 191 U.S. 341, wherein the court said at page 352:

> "We must see therefore, what those facts are *in order to intelligently determine the applicability of the rule asserted by the plaintiff in error.*" (Emphasis supplied.)

It conflicts also with the rule as to determination of value of property being condemned as stated by the Supreme Court in the case of *Campbell v. U.S.,* 266, U.S. 368, in affirming the award by the lower court of $750 for 1.81 acres taken and $2,250 for damage to the remaining lands owned by Campbell. The Court quoted at page 371 the rule that has become recognized

as controlling in all courts, namely:

> "just compensation is safeguarded by the Fifth Amendment to the Constitution, that is, the value of the land taken and the damages inflicted by the taking is in such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken, *Seaboard Air Line, Seaboard Ry. Co. v. U.S.,* 261, U.S. 299 304."

The PUD established at the trial that while constructing the Box Canyon dam, it acquired from the Cooper estate as a part of the same package not only the perpetual rights to back the water upon and overflow the shore lands lying upstream from the Box Canyon dam site which were necessary to the Box Canyon project, but it also acquired all of the downstream rights which are being condemned in this action and that the properties constitute a united whole of public utility properties. Furthermore, this package included Colonel Cooper's drawings, engineering data, and development work, acquired by the PUD as a part of its plan for the development of a dam and power house at the Z Canyon site (R. 35). Colonel Cooper had proved the solidness and soundness of the foundation of the Z Canyon dam site. This was an established fact (Finding of Fact XVI, R. 91-2).

Had PUD been permitted to do so, it would have established additional facts which, when considered with facts already proven, would bring the case at

bar within the holding of the Court in *West Virginia Pulp & Paper Co. v. U. S.,* 200 F. 2d 100 (4th Cir., 1952). In the cited case, it is recognized that the rule of severance damage is applicable when a portion of properties, all of which have been acquired and integrated by plans for a particular use, are taken even though the portion so taken has not yet in fact been actually devoted to the planned use. At p. 103 of the citation, the Court said:

> "The company complains, also, because the trial judge excluded evidence tending to show that the company had acquired the tract of land part of which was taken, together with adjacent lands, the whole comprising a total of approximately 413 acres, as a site for plant expansion and that the whole was needed for the construction of a pulp dissolving plant the construction of which had been authorized by the company and was being delayed only because of difficulty in securing necessary materials. We think that this testimony was admissible for the purpose of showing that the contiguous tracts of land acquired by the company had been acquired for the purpose named and had been integrated for that purpose into a single tract so that depreciation in the value of the entire tract could be considered by the jury in making its award."

and again said at page 104:

> " 'If, however, several contiguous lots or tracts in reality constitute an entire parcel used for one general purpose by the common owner, the inquiry should embrace all injuries which will be caused to the entire body of land.' " 20 C.J. 735, 736; 29 C.J.S. Eminent Domain, Sec. 140, page 981; 18 Am. Jur. 910; note 6 A.L.R. 2d 1197, 1230."

In the case of *U.S. v. Pope and Talbot, Inc.*, 293 F. (2d) 822, this Court cited the *Pulp* case and said its reasoning was controlling.

If PUD had not been stopped at the threshhold, it would have shown that when it was building its Box Canyon plant it was aware of deficiencies that would cause Box Canyon to go out of production in periods of high water, which could be remedied by a plant at Z Canyon. Other benefits to Box Canyon's power production capabilities would also have been shown to result from a coordinated operation with such a downstream plant. The showing would be made that the downstream properties being taken by Seattle were acquired with Box Canyon construction funds as additions and betterments to the Box Canyon project with the approval of the lender, R.F.C. The Court compounded its original mistake by rejecting Construction and Acquisition Resolution (D-I-118 - R. Tr. 893).

It would also have been shown that, due to the unusual topographyof the Z Canyon-Boundary area being condemned, in combination with stream-flow fluctuations, the same high water which destroys production at PUD's Box Canyon dam and thereby destroys the ability of Box Canyon to provide a firm uninterruptable load to its customers by the increased head at the narrow Z Canyon dam would be made to produce power at PUD's proposed Z Canyon project in excess of its annual firm power capabilities. This situation is unique in that the excess power at Z Can-

yon could be used without any additional cost to the PUD, since it would be available at the exact time it is needed at Box Canyon. Such a showing would make the doctrine of severance damage particularly applicable. In other words, the market value of all of the PUD properties on the river, considered as an integrated unit in common ownership, would be greater than would be the combined market value of both the Z Canyon properties and Box Canyon properties if owned or sold separately.

It was not PUD's purpose to show special damage it might have suffered because its Z Canyon plans were frustrated. It did propose, however, to show that its remaining power producing property, the Box Canyon project, would be depreciated in value by reason of the severance of the downstream properties.

The facts set forth in this case fit perfectly into the principles which the courts have so often stated as applying to the facts in each case which was then being considered. We have here:

First, the unity of ownership in the PUD of both the Box Canyon plant and the properties purchased.

Second, the contiguity of the properties to the Box Canyon dam properties, both above and below the dam, made a complete whole of this public utility. One part is already producing power and the other part of it was planned to be used to produce power to firm up the loss of power by high water at the producing plant.

Third, the PUD had plans fully developed for a dam at Z Canyon. It is in fact a partially developed dam site. The PUD had directed the manager to apply for a Z Canyon license. (D.-E-122).

Counsel for PUD has been unable to find a case involving a combination of river flow and such unusual topography of the areas of property taken and property remaining in relation to hydroelectric power production as in the instant case. This is due probably to the fact that no such a contrast in topographical condition exists where hydroelectric power is produced. There is no comparable. To that extent, this may be said to be the case of first impression. The fact that this is a hydroelectric reduction in value instead of land depreciation does not affect the application of the same principles relating to severance damages here.

The trial court's ruling excluding all evidence on the subject of severance damages should be reversed and the case remanded with direction to admit such evidence in order to be able "to intelligently determine" whether severance, damages should be allowed, and if so, the amount of such damages.

CONCLUSION

It has been established in this case by the testimony of such world-renowned hydroelectric engineers as Neville C. Courtney and Donald J. Bleifuss, the testimony given and exhibits prepared by Arthur E. Allen, head of the Engineering and Planning Department of Harza Engineering Co., recognized as one

of the outstanding dam-building organizations in the world, the testimony of the well-qualified appraisal specialist, John L. Vaughan, as well as by photographs, maps, and other visual evidence, that the properties and rights owned by PUD and condemned herein by its erstwhile big brother constitute one of the best, most unique, and incomparable sites for a hydroelectric project that can be found anywhere. That the properties would be used for power site purposes was as certain as that the night follows the day.

Common sense dictates that had these properties and rights been the subject matter of a voluntary transfer both the buyer and seller would have gone through the same procedures and taken the same things into consideration in arriving at price as did the highly qualified and experienced valuation witnesses called by the PUD.

> "As was well said by the late Judge Henry G. Connor, one of the great judges of this Circuit, 'It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.' " *United States v.* 25.406 *Acres of Land, etc.,* 172 F. 2d 990 at p. 993.

To say that inapplicable, fictional, and artificial formulas or rules make it impossible to arrive at a fair value is to make a mockery in this case of the constitutional guarantee of just compensation. As was so aptly said in the case last above quoted, at page 995:

> "Artificial rules of evidence which exclude from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result. In no

> branch of the law is it more important to remember this, than in cases involving the valuation of property, where 'at best, evidence of value is largely a matter of opinion., See *Montana R. Co. v. Warren,* 137 U.S. 348, 352, 11 S. Ct. 96, 34 L. Ed. 681."

The Judgment and Decree of the District Court should be reversed; the only evidence offered that considers power site value which was stricken should be reinstated in the record, and this Court should enter a Judgment and Decree awarding just compensation to PUD based upon that evidence; and the cause should then be remanded for further proceedings in the District Court for consideration of severance damage.

In the alternative, the Judgment and Decree of the District Court should be reversed and the cause remanded for new or further trial with instructions that the evidence offered by PUD with reference to valuation as set out in the specifications of error is competent, material, and admissible, and that the fact that the PUD's properties being taken were not yet actually being devoted to the purposes for which they were acquired does not rule out the applicability of the principle of severance damage to the balance of PUD's power-producing properties.

Respectfully submitted,

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EXHIBIT APPENDIX

Exhibit No.	Description	R. Tr. Page Admitted
P- 1	Order Dated 6-14-13	34
P- 2	Conveyance of Shorelands dated 3-27-15	34
P- 3	Deed	34
P- 4	Conveyance of Shorelands, 3-31-53	34
P- 5	Deed	34
P- 6	Conveyance of Shorelands, 3-31-53	34
P- 7	Easement Deed	34
P- 8	Quitclaim Deed	34
P- 9	Decision upon Application for a License for a Hydroelectric Project	34
P-10	Order Modifying and Adopting Presiding Examiner's Initial Decision Issuing License for Project No. 2144	34
P-11	Order Modifying Order Issuing License and Denying Applications for Rehearing	34
P-12	General Map of Project Area	34
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P-14	Reservoir Map	34
P-15	Plant Area Map	34
P-16	Lists of Ownership — 1956	34
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P-20	Order	34
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EXHIBIT APPENDIX (Cont'd)

Exhibit No.	Description	R. Tr. Page Admitted
P-22	Amended Application for a Permit to Appropriate Public Waters of the State of Washington	34
P-23	Amended Application for a Permit to Construct a Reservoir and to Store for Beneficial Use the Unappropriated Waters of the State of Washington	34
P-26	Drawing D-19071	37
P-27	Project Location Map	37
P-28	United States Corps of Engineers Map of Columbia River Drainage Area	38
P-30-a-h	Aerial photographs of Boundary project area	39
P-31	Drawing D-19085 (General plan of Boundary project works area showing location of the Z Canyon gaging station easement)	41
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P-40	List of properties in which P.O. Mines and Metals has an interest (Jensen Deposition Exhibit A)	1605
P-41	Blueprint Map — P.O. River Area (Jensen Deposition Exhibit B)	1606
P-58	Property Map of major mining interests in Metaline Mining District (McConnell Deposition Exhibit 1)	1698
P-59	Map of part of Metaline Mining District (McConnell Deposition Exhibit 2)	1698

EXHIBIT APPENDIX (Cont'd)

Exhibit No.	Description	R. Tr. Page Admitted
P-60-74	Correspondence (McConnell Deposition Exhibits (3 to 17)	1697
P-75	Map of project area (McConnell Deposition Exhibit No. 24)	1698
P-76	List of Metaline Contact Mines Properties (McConnell Deposition No. 25)	1698
P-79	Profile, Natural and Backwater Surface Slopes, Z Canyon	1305
P-80a, b	Maps	1726
P-81	Overlay	1729
P-82, 3, 4	Copies of restoration orders, restoring lands to mineral exploration	1745
D-109	Map showing location of PUD's properties and rights on Pend Oreille River	470
D-110	Executive order, 7-2-10 creating power site reserve No. 72	992
D-111	Executive order dated 7-10-13 creating power site reservation No. 384	992
D-112	Drawing showing proving work done at Z Canyon	438
D-113, 4	Photos of Z Canyon	442
D-116	Resolution of PUD Commissioners dated 12-1-52	892
D-117	Voucher, 5-25-53, Cooper to PUD	892
D-119	Ltr, 10-28-53, Hoffman to PUD	335
D-120	Ltr, 10-30-53, Hoffman to Seattle City Council	336
D-122	PUD Resolution No. 328, 6-11-54	908
D-123	Memorandum of Intent, PUD and Seattle, dated 8-25-54	906

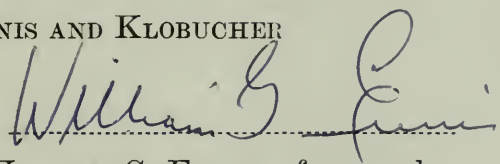
EXHIBIT APPENDIX (Cont'd)

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARENCE C. DILL

ENNIS AND KLOBUCHER

By 

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